

Martinez agrees that he did not tell the doctors he had suffered an accident at work because, due to the gradual onset of pain, he did not know what was wrong with his back and he had not suffered a specific accident. Nevertheless, Martinez argues he did tell the doctors that the onset of pain occurred at work. Martinez further argues that he did tell his manager his back was hurting while he was working which should have inferred his pain was caused by the work. Martinez requests the Board affirm the ALJ's Order.

The sole issue upon this appeal from a preliminary hearing is whether Martinez met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Sergio Martinez was employed as a warehouse man for respondent. His job duties required him to pull frozen meat products in order to fill orders and then to load and unload trucks. He used a standing forklift to unload and load the trucks.

While working on August 18, 2010, Martinez experienced an onset of back pain and leg numbness which progressively worsened during the day. Martinez told his manager that his back was acting up. He testified:

On August 18th I went to work, like I did every day, I did what I was told to do. And about between 3:00, 3:15, 3:30 – I don't carry a watch so I don't know, but it was after three – I notified my manager, Eric Schaffer, that my back was acting up on me. And he asked me if I would like to go home and I told him I didn't make no money staying at home, and I suggested if I laid down a little bit maybe. I didn't know what was wrong with my back. I told him laying down for a bit would probably help. And he told me that I was, after he asked me if I wanted to go home and I told him no, he told me he would put me in something lighter. And I said all right. He did put me in something lighter, and we started loading the truck with cardboard.¹

Martinez then told his supervisor, Daniel Manuellos, about his back and that his leg was going numb. Although he kept working, he testified that his back kept bothering him and he told Mr. Schaffer that he was going to see Dr. Scott Bledsoe the next morning.

Martinez testified that the next morning he had to crawl out of bed due to his back pain and he took sick leave on August 19th and 20th due to his back pain. Martinez did go to see Dr. Bledsoe on August 19, 2010. Martinez stated that he told Dr. Bledsoe what happened but did not specifically say that he had suffered an accident at work. Dr. Bledsoe's notes of the August 19, 2010 office visit reflect that Martinez provided a history that his pain started yesterday but that Martinez did not recall any precipitating event or injury.² Dr. Bledsoe prescribed a lumbar spine MRI for Martinez to be taken on August 20, 2010.

¹ P.H. Trans. at 10.

² *Id.*, Cl. Ex. 1.

Martinez returned to work on August 24th and 25th and operated the stand up forklift. Martinez also saw Dr. James Weimar on August 25, 2010. Martinez filled out forms before his examination and marked “no” in response to a question “Is this a work related injury”; marked “yes” in response to a question whether his work exposed him to heavy lifting; and marked “neither” in response to a question whether his problem related to a work injury or accident.³ Dr. Weimar’s notes reflect a history of back pain and muscle spasm such that Martinez could not get out of bed. Dr. Weimar discussed treatment options with Martinez and opined Martinez should continue taking his muscle relaxer and undergo physical therapy to help with muscle stretching and back strengthening.

Martinez then had a follow-up appointment with Dr. Bledsoe on August 26, 2010. The MRI on August 20, 2010, revealed moderate diffuse disk bulge at the L4-5 level with a superimposed right paracentral disk extrusion extending below the level of the disk plane and pressing on the existing right nerve root, moderate diffuse disk bulge at L5-S1 level and no high grade central canal or foraminal stenosis was identified. The doctor discussed the results of the MRI and took Martinez off work for one month. Dr. Bledsoe placed a restriction on claimant of no lifting greater than 10 pounds. Martinez provided the restrictions to Mr. Schaffer, but has been off work since August 26, 2010, because respondent was not able to accommodate his restrictions.

When Mr. Schaffer told Martinez that respondent could not accommodate his restrictions, Martinez asked to be laid off instead. Martinez believed that if laid off he would have been able to collect unemployment benefits. On August 30, 2010, Martinez then called respondent’s office manager and reported that he had suffered a work-related injury.

Respondent referred Martinez to Dr. Mark Dobyns for an evaluation and examination. Martinez filled out a form and in response to a question asking how and where the accident happened he noted: “Back started hurting [sic] at work.”⁴ But in his office notes, Dr. Dobyns recorded the following history in pertinent part:

The patient presents for evaluation of low back pain that came on a couple of weeks ago. He really did not do anything specific. He just started having pain while he was at work. There was no specific injury.⁵

Dr. Dobyns diagnosed Martinez with a sprain to his lumbar spine. Dr. Dobyns recommended Martinez continue physical therapy and prescribed Naproxen for pain and inflammation. But if Martinez did not improve within 10 days, the doctor noted he would refer Martinez to Dr. Goel for steroid injections. Martinez returned for a follow-up visit with

³ *Id.*, Cl. Ex. 2.

⁴ *Id.*, Cl. Ex. 3.

⁵ *Ibid.*

Dr. Dobyns on September 10, 2010, due to having low back pain and intermittent tingling into the right low back. The doctor referred claimant to Dr. Goel for a consultation regarding steroid injections.

In summary, Martinez had an onset of back pain with numbness into his leg while performing his work. He told the manager and his supervisor that his back was hurting and he was asked if he wanted to go home. Martinez declined that offer but was told he could perform a different job that did not require lifting. He testified that his work, at times, required heavy lifting. He told his manager that his back was hurting and that he was going to see a doctor the following day. Martinez testified:

Q. On August 18th, that day, if I understand it, you spoke is [sic] Eric Schaffer?

A. I notified Eric Schaffer.

Q. At that time you did not tell Mr. Schaefer that this is a work-related injury; is that correct?

A. I didn't think I would have to tell him, I was at work.⁶

The next morning Martinez was in severe back pain and sought treatment from his personal physician. And when he went for treatment he did not state that he had suffered a specific traumatic accident at work.

Respondent points to the medical records as confirmation that Martinez did not suffer a work-related accident because he did not state he had been injured at work and specifically denied a work injury in a form filled out for Dr. Weimer. This fails to account for the fact that Martinez told both the manager and his supervisor that his back was bothering him and the manager, apparently recognizing that lifting at work impacted Martinez' back pain, assigned him a different job. Secondly, it is not unusual that a lay person, unfamiliar with workers compensation law, would not equate the term accident with repetitive or mini-trauma injuries. Or that a lay person would define an accident as a single traumatic event. Accordingly, under the facts of this case, this Board Member concludes the manner in which the claimant filled out the medical questionnaire forms for Dr. Weimer does not equate to an inconsistent position nor refute Martinez' assertion that he suffered a work-related accident. When Martinez completed the forms he answered truthfully because he did not believe he had suffered an accident. But Martinez did consistently tell the manager, his supervisor and Dr. Bledsoe that the onset of back pain and leg numbness occurred at work.

Furthermore, Martinez' actions asking about the possibility of being laid off followed respondent's denial to accommodate his restrictions. Martinez simply was seeking a

⁶ P.H. Trans. at 19.

manner to obtain income while unable to work while getting treatment for his back. Again, he did not understand that a series of repetitive traumas constitutes accidental injury. This Board Member finds, based upon the evidentiary record compiled to date, that Martinez has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated November 1, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
Brandon A. Lawson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2009 Supp. 44-555c(k).